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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte LELAND JAMES WIESEHUEGEL,
REBECCA LYNN ROBERTS, CHARLES H. LOAR,
and CARLOS JOEL FORMIGA XAVIER

Appeal 2007-3402
Application 09/773,197
Technology Center 3600

Decided:¹ February 6, 2009

Before HUBERT C. LORIN, ANTON W. FETTING, and DAVID B.
WALKER, *Administrative Patent Judges*.

WALKER, *Administrative Patent Judge*.

¹The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, begins to run from the decided date shown on this page of the decision. The time period does not run from the Mail Date (paper delivery) or Notification Date (electronic delivery).

DECISION ON APPEAL
STATEMENT OF THE CASE

The Appellants seek our review of the Examiner's final rejection of claims 1-15 under 35 U.S.C. § 134 (2002). We have jurisdiction under 35 U.S.C. § 6(b) (2002). We affirm.

Appellants claim technology for providing dynamic catalogs containing available product descriptive information for conducting an interactive offer and bid collection process over a computer network (Specification 3:5-7). Claim 1, reproduced below, is representative of the subject matter on appeal.

1. A method for providing electronic catalogs of information sets regarding available products for bid or purchase through an online auction or bidding system collectively referred to as an Interactive Offer System, said method comprising the steps of:

providing at least two repositories of information sets and data items, at least one of said repositories being indexed to part numbers and manufacturer identifiers;

dynamically linking said information sets and data items to said part numbers and said manufacturer identifiers for available products by executing a synchronization script or program, said execution being triggered at a predetermined time or responsive to a predetermined event;

upon request by a trader, synchronizing contents of a Sales Preparation System with said

repositories such that said information sets and said data items within said repositories represent full information sets of most recently created data items, including the contents of said Sales Preparation System;

promoting said synchronized Sales Preparation System contents to an online auction system responsive to authorization of said trader; and

presenting said promoted contents to one or more online bidders via said online auction system.

THE REJECTIONS

The Examiner relies upon the following as evidence in support of the rejection:

Perkowski US 2003/0009392 A1 Jan. 9, 2003

1. Claims 1-15 are rejected under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement.
2. Claims 1-13 are rejected under 35 U.S.C. § 112, second paragraph, as indefinite.
3. Claims 1-15 are rejected under 35 U.S.C. § 102(b) as anticipated by Perkowski.

ISSUES

The first issue before us is whether the Examiner erred in rejecting claims 1-15 under 35 U.S.C. § 112, first paragraph, as failing to comply with

the written description requirement. The correctness of the written description rejection turns on whether the Specification conveys with reasonable clarity to those skilled in the art that, as of the filing date sought, Appellants were in possession of (1) “dynamically linking said information sets and data items to said numbers and said manufacturer identifiers;” and (2) “dynamic links between the descriptive data items, said part numbers and said manufacturer identifiers.”

The second issue before us is whether the Examiner erred in rejecting claims 1-13 under 35 U.S.C. § 112, second paragraph, as indefinite. The indefiniteness rejection turns on whether those skilled in the art would understand the following claim terms when the claim is read in light of the specification: (1) how “executing a synchronization script or program” “dynamically links the information sets and data items to the part numbers and the manufacturer identifiers;” (2) what are the “contents of a Sales Preparation System;” (3) how does saving a copy of an information set statically link the copy to the most recently created data items; (4) “a user interface to an Interactive Offer System user interface;” and (5) how does further adapting the repository synchronizer to replace and add links on a timed basis further limit the system.

The third issue before us is whether the Examiner erred in rejecting claims 1-15 under 35 U.S.C. § 102(b) as anticipated by Perkowski. The correctness of the anticipation rejection turns on whether Perkowski teaches “dynamically linking . . . by executing a synchronization script or program

triggered at predetermined time or responsive to a predetermined event” and whether certain arguments advanced by the Appellants are commensurate with the scope of the claims.

FINDINGS OF FACT

We find the following enumerated findings to be supported by at least a preponderance of the evidence. *Ethicon, Inc. v. Quigg*, 849 F.2d 1422, 1427 (Fed. Cir. 1988) (explaining the general evidentiary standard for proceedings before the Office).

1. The Specification discloses that

Initially, one or more databases are loaded with current descriptive information about items which may be made available for bidding or purchase, such as item part numbers, descriptions, specifications, photographs or illustrations, pieces and quantities. This descriptive information is dynamically linked to the manufacturer identifier and the part number. In the second phase of the process, each time a trader requests current descriptive information about an available part number, the databases containing descriptive information are dynamically synchronized so as to link to the most recently available information, thereby providing the trader with the most current descriptive information automatically.

(Specification 8:6-15).

2. The Specification also teaches that

Initially, if no descriptive information is contained

in SPS for a particular part number, the cataloger (604) may be tasked to photograph the item, find current specifications for the item, etc. These descriptive information items (605, 606 and 607) are then loaded into SPS to form an initial set of descriptive information 10 which is dynamically linked to the part number and manufacturer identifier.

Whenever new information is available, such as a new photograph showing a change in the product model, this can be entered by the cataloger and dynamically linked to the part number so as to replace the previously linked photograph in all instances, lots, and offers.

(Specification 12:6-14).

3. An object of the invention disclosed in Perkowski

is to provide a novel consumer product information catalog subsystem (RDBMS) for use within an Internet-based consumer product information management, distribution and serving system, wherein one or more computer programs (e.g. scripts) are provided in the RDBMS for the purpose of (i) analyzing the information fields of the RDBMS, (ii) automatically generate a set of UPN/Trademark/Product-Descriptor/URL data links for each UPN-indexed product with the RDBMS, (iii) locally store each set of UPN/TM/PD/URL data links within the RDBMS, and (iv) ultimately electronically data transport each such set of data links to a UPN/TM/PD/URL RDBMS employed within a consumer product information management, distribution and serving system realized over the Internet.

(Perkowski [0080]).

PRINCIPLES OF LAW

The factual inquiry for determining whether a specification provides sufficient written description for the claimed invention is whether the specification conveys with reasonable clarity to those skilled in the art that, as of the filing date sought, applicant was in possession of the invention as now claimed. *Vas-Cath, Inc. v. Mahurkar*, 935 F.2d 1555, 1563-64 (Fed. Cir. 1991). An applicant shows possession of the claimed invention by describing the claimed invention with all of its limitations using such descriptive means as words, structures, figures, diagrams, and formulas that fully set forth the claimed invention. *Lockwood v. American Airlines, Inc.*, 107 F.3d 1565, 1572 (Fed. Cir. 1997).

The test for definiteness under 35 U.S.C. § 112, second paragraph, is whether “those skilled in the art would understand what is claimed when the claim is read in light of the specification.” *Orthokinetics, Inc. v. Safety Travel Chairs, Inc.*, 806 F.2d 1565, 1576 (Fed. Cir. 1986) (citations omitted).

We determine the scope of the claims in patent applications “not solely on the basis of the claim language, but upon giving claims their broadest reasonable construction ‘in light of the specification as it would be interpreted by one of ordinary skill in the art.’” *Phillips v. AWH Corp.*, 415 F.3d 1303, 1316 (Fed. Cir. 2005) (en banc) (*quoting In re Am. Acad. of Sci. Tech. Ctr.*, 367 F.3d 1359, 1364 (Fed. Cir. 2004)). We must be careful not

to read a particular embodiment appearing in the written description into the claim if the claim language is broader than the embodiment. *See Superguide Corp. v. DirecTV Enterprises, Inc.*, 358 F.3d 870, 875 (Fed. Cir. 2004) (“Though understanding the claim language may be aided by the explanations contained in the written description, it is important not to import into a claim limitations that are not part of the claim. For example, a particular embodiment appearing in the written description may not be read into a claim when the claim language is broader than the embodiment.”). The challenge is to interpret claims in view of the specification without unnecessarily importing limitations from the specification into the claims. *See E-Pass Techs., Inc. v. 3Com Corp.*, 343 F.3d 1364, 1369 (Fed. Cir. 2003).

We remind Appellants that it is their burden to precisely define the invention, not that of the Examiner. *In re Morris*, 127 F.3d 1048, 1056 (Fed. Cir. 1997). Appellants always have the opportunity to amend the claims during prosecution, and broad interpretation by the examiner reduces the possibility that the claim, once issued, will be interpreted more broadly than is justified. *In re Prater*, 415 F.2d 1393, 1404-05 (CCPA 1969).

“A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference.” *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631 (Fed. Cir. 1987), *cert. denied*, 484 U.S. 827 (1987). The prior art may anticipate a claimed invention, and thereby render it non-novel, either

expressly or inherently. *In re Cruciferous Sprout Litig.*, 301 F.3d 1343, 1349 (Fed. Cir. 2002). Express anticipation occurs when the prior art expressly discloses each limitation (i.e., each element) of a claim. *Id.* In addition, “[i]t is well settled that a prior art reference may anticipate when the claim limitations not expressly found in that reference are nonetheless inherent in it.” *Id.*

To establish inherency, the extrinsic evidence must make clear that the missing descriptive matter is necessarily present in the thing described in the reference, and that it would be so recognized by persons of ordinary skill. Inherency, however, may not be established by probabilities or possibilities. The mere fact that a certain thing may result from a given set of circumstances is not sufficient.

In re Robertson, 169 F.3d 743, 745 (Fed. Cir. 1999) (citations omitted) (internal quotation marks omitted).

ANALYSIS

As a preliminary matter, the Appellants’ brief presents arguments relating to the Examiner’s:

a) objection to the disclosure and Figures 3 and 4 with respect to the terminology and naming convention of a Parts Catalog, including a database;

b) objection to the disclosure and Figures 3 and 4 with respect to the terminology and naming convention of a Sale Preparation System (SPS), including a database;

c) objection to the disclosure and Figure 3 with respect to the terminology and naming convention of an Interactive Offer Server (IOS), including a database;

d) objections to the drawings for failing to show every feature of the invention specified in the claims, specifically “two-computer readable repositories”, an “offer description creator,” and an “offer list creator”; and,

e) objections to the Specification for failing to provide proper antecedent basis for the claimed elements, steps, or limitation of “repositories of information sets,” “computer-readable repositories of descriptive data items,” “offer description creator,” and “offer list creator.”

The Examiner found that these issues relate to petitionable subject matter under 37 C.F.R. § 1.181 and not to appealable subject matter. (Answer 2-3, citing MPEP § 1002 and § 1201). We agree with the Examiner that these matters are not directly connected with the merits of issues involving a rejection of claims, and therefore are reviewable by petition to the Commissioner rather than by appeal to this Board. *See In re Hengehold*, 440 F.2d 1395, 1403-04 (CCPA 1971). Accordingly we shall not decide or further discuss the Appellants’ arguments regarding the Examiner’s objections.

Rejection of claims 1-15 under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement.

The Examiner found that the original specification does not have support for the steps of “dynamically linking said information sets and data items to said numbers and said manufacturer identifiers” as required by claims 1 and 6 and “dynamic links between the descriptive data items, said part numbers and said manufacturer identifiers” as required by claim 11.

The Appellants argue that the Examiner is incorrect because:

According to the preferred embodiment, the invention integrates to the current IOS via the SPS. A cataloger (604) collects or receives current product descriptive information and places it into the SPS database as it is available, as is it may need to be updated. Initially, if no descriptive information is contained in SPS for a particular part number, the cataloger (604) may be tasked to photograph the item, find current specifications for the item, etc. These descriptive information items (605, 606 and 607) are then loaded into SPS to form an initial set of descriptive information which is dynamically linked to the part number and manufacturer identifier. (Pg. 12, lines 3 - 14).

(Br. 13-14) (emphasis in original).

According to the Appellants, “information sets” as recited in the claims are directly referring to the “set of descriptive information,” as disclosed. The Appellants argue that further support is provided by the language which describes the “set of descriptive information” as being

dynamically linked to the part number or the manufacturer identifier (Br. 14). The passage cited above conveys with reasonable clarity to those skilled in the art that, as of the filing date sought, Appellants were in possession of “dynamically linking said information sets and data items to said numbers and said manufacturer identifiers” as required by claims 1 and 6.

With respect to claim 11, the Appellants argue that written description support for “dynamic links between the descriptive data items, said part numbers and said manufacturer identifiers” as required by claim 11 is provided by the following passage of the Specification:

... This descriptive information is dynamically linked to the manufacturer identifier and the part number. (Pg. 8, lines 9 - 10)

...

These descriptive information items (605, 606 and 607) are then loaded into SPS to form an initial set of descriptive information which is dynamically linked to the part number and manufacturer identifier. (Pg. 12, lines 8 - 10).

(Br. 14).

According to the Appellants, “set of descriptive information” is referring to descriptive information items, and as shown from these additional excerpts, links are dynamically made to “manufacturer identifiers” (Br. 14). The passages cited above convey with reasonable clarity to those skilled in the art that, as of the filing date sought, Appellants

were in possession of “dynamic links between the descriptive data items, said part numbers and said manufacturer identifiers” as required by claim 11.

The Appellants thus have shown that the Examiner erred in rejecting claims 1, 6, and 11, and claims 2-5, 7-10, and 12-15 which depend therefrom, under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement.

Rejection of claims 1-13 under 35 U.S.C. § 112, second paragraph, as indefinite.

The Examiner found that the metes and bounds of claims 1 and 6 are unclear. In particular, the Examiner found that it is unclear how “executing a synchronization script or program” “dynamically links the information sets and data items to the part numbers and the manufacturer identifiers” (Answer 5). According to the Examiner, one skilled in the art will consider a synchronization step occurring by mere execution of the synchronization script or program; thus, it is unclear how copying information from one database to another database, which is synchronization, results in dynamic linking when synchronizing information constitutes placing information of a newer database to an older database; as a result, both databases will have the same information (Answer 5). The Examiner found that it is still unclear how executing the synchronization script or program causes dynamic linking as in a hyperlink (Answer 11).

Appellants argue that they have claimed an enhanced synchronization process which ensures that where data sets include links to other sources. Those links are dynamically updated in all data sets to point to the same sources (e.g., the links are synchronized) (Br. 19). We agree that those skilled in the art would understand the claim language that requires “dynamically linking said information sets and data items to said part numbers and said manufacturer identifiers for available products by executing a synchronization script or program” when the claim is read in light of the Specification. The Appellants’ interpretation is consistent with the Specification, which discloses that descriptive information is dynamically linked to the manufacturer identifier and the part number; those dynamic links are synchronized or updated when a trader requests current descriptive information about an available part number; and the databases containing descriptive information are dynamically synchronized so as to link to the most recently available information (Finding of Fact 1).

The Examiner also found that it is unclear what are the “contents of a Sales Preparation System” (Answer 5). The Appellants argue that they

have clearly disclosed that the SPS database (60) may automatically synchronize (76) its contents with the contents of other databases, such as the parts database (609), on a periodic basis, such as daily (pg. 14, lines 7-9, for example), and that these contents typically include descriptive information such as photographs, text descriptions, specifications, quantities, etc. (pg. 14, lines 3 – 4, for example).

(Br. 19). The Examiner challenges the Appellants' reliance on the SPS database (60), finding that a database and a system are two different concepts, thus how can a system be a database (Answer 11). The Examiner also found that if the SP system is the database as applicants allege, then the contents, i.e., which includes photographs 605, specifications 606, and quantities 607, results in double inclusion of the same thing because these contents are the same data items. The Examiner alleges that the contents are included twice since the Specification indicates on page 12, lines 8-10 that the data items 605, 606, and 607, in claim 1, line 4, also are the same features of the contents of the SPS. The Examiner further questions how can the contents of the SPS and the data items synchronize (Answer 12).

The Appellants argue that the SPS may be one of at least two databases in the system, and if there are only two, then it would be nonsensical to try to synchronize the SPS to the second database and also to itself. However, the phrase "at least two repositories of information sets and data items" also allows for 3, 4, or even more total databases, only one of which may be an SPS. According to the Appellants, in this embodiment covered by the claims, the step recited to synchronize to the other databases (plural) is accurate and clear (Br. 20). We agree that those skilled in the art would understand the meaning of contents of a Sales Preparation System. The Specification provides sufficient clarity regarding the contents of a Sales Preparation System, and the Appellants proposed claim interpretation

is consistent with a broadest reasonable interpretation in light of the Specification (Findings of Fact 1 and 2).

Regarding claims 5 and 10, the Examiner further inquires how does saving a copy of an information set statically link the copy to the most recently created data items (Answer 5). The Appellants argue that they do not understand from the wording of this rejection whether the Examiner means “most recently created” or “most often created” (Br. 20). The Examiner noted that it is clear that the Examiner is referring to the “most recently created data items,” and found that the Appellants have not resolved the issue which is how does saving a copy of a set statically link the copy to the items for someone skilled in the art to particularly understand (Answer 12). The Appellants make no substantive argument regarding this rejection in the Reply Brief. The Appellants thus have not shown error in the Examiner’s rejection.

The Examiner further found that the metes and bounds of claim 11 are unclear, because that claim is directed to a system yet it is unclear whether the repositories, the dynamic links, the repository synchronizer, the offer promoter, and the user interface are physical components as in electronic components. According to the Examiner, if these are mere electronic databases, databases need to be residing in a computer medium as in memory, or a record medium to exist. The Examiner also found that the limitation “a user interface to an Interactive Offer System user interface” is either grammatically incorrect or the limitation is incomplete (Answer 5-6).

The Appellants argue that the Examiner implied that “databases” must be residing in memory in order to exist, and presumably in order to be patentable. According to the Appellants, this confuses “data” with “databases,” the former being an abstract set of values, and the latter being systems and products well known in the art to be computer applications, programs, and data structures which can hold, retrieve, and manipulate data. The Appellants argue that the Examiner has not offered in the rationale any evidence to support a holding of “databases” being abstract “data” devoid or separate from computer hardware, programs, or the like (Br. 21).

The Examiner found that the claims are directed to a physical or tangible system, but claim 11 merely recites databases without mentioning where they are resided, thus rendering it questionable whether the system is structural, or is just mentally construed ideas since it is unclear where the databases are residing (Answer 13). We find that the Examiner has not made a persuasive showing that claim 11 is indefinite. The Appellants are correct that the cited limitations are not restricted by the claim language to a particular location.

With respect to claim 12, the Examiner questioned how does further adapting the repository synchronizer to replace and add links on a timed basis further limit the system? With respect to claim 13, the Examiner questions how does further adapting the repository synchronizer to replace and adds links responsive to a request for information from the repositories further limit the system? (Answer 6). The Appellants argue that because

claim 12 depends from claim 11, the addition of further adapting the synchronizer on a timed basis adds functionality included in the open claim form, and thus by definition further limits the scope of claim 11. The Appellants similarly argue that because claim 13 depends from claim 11, likewise specifying that the synchronizer is also adapted to update links responsive to any request for information from the repositories, in addition to being adapted to perform link updates responsive to requests from traders (Br. 21). The Examiner has not made a persuasive showing that claims 12 and 13 are indefinite.

Rejection of claims 1-15 under 35 U.S.C. 102(b) as anticipated by Perkowski.

The Appellants argue that Perkowski teaches creating and updating links manually, not automatically using synchronization scripts as claimed by Appellants (Br. 22). The Examiner found that the rejected claims do not recite “updating links automatically,” and thus the argument is not commensurate with the scope of the claims (Answer 13). We agree.

The Appellants further argue that Perkowski discloses normal database synchronization operations (e.g., copying data between databases), but does not disclose updating links within those databases in the manner disclosed and claimed (Br. 22). The Examiner found that the fact that synchronization is conventional does not render the process unreadable on

the claims, which broadly recite synchronization and read on conventional techniques (Answer 14). We agree.

The Appellants also argue that the claimed system is transactional in nature, wherein the links between databases are updated in real time or on-demand (Appellants' definition of "dynamically") either in response to a specific event, such as a trader requesting sales preparation information, or upon a certain update period. According to Appellants, the claimed system is event driven and automated such that all catalog information is updated on-demand without the need for human link creation or modification (Br. 23, citing Specification 12:20-22, 13:4-6 & 16-18). The Examiner found that "updating in real-time or on-demand" is nowhere recited in the rejected claims, and therefore the Appellants' argument is not commensurate with the scope of the rejected claims. The Examiner also found that the argued definition of "dynamically," e.g., updating in real-time or on demand, is not present in the recited pages and line numbers of the Specification (Answer 14). We agree with the Examiner that updating in real-time or on-demand is not explicitly recited in the claims. Moreover, the cited passages teach that this script *can be* set to run periodically, such as once per day, and/or upon an event, such as receipt of a request for information regarding a particular part number, but do not create a lexicographic definition of "dynamically" that requires updating in real-time or on demand. The Appellants' argument thus is not persuasive because it is not commensurate with the scope of the claims.

The Appellants further argue that claims 1, 6, and 11 recite “dynamically linking . . . by executing a synchronization script or program triggered at predetermined time or responsive to a predetermined event” and Perkowski is silent as to such script triggering and execution to modify links (Br. 23). The Examiner found that Perkowski discloses this limitation at paragraph [0080] (Answer 16). The Appellants characterize paragraph [0080] of Perkowski as describing automatic generation of sets of links which are stored in the RBDMS, and ultimately transported also to another system, but argue that the passage does not describe dynamically linking between databases in the manner Appellants have claimed and instead Perkowski’s links are exchanged by transporting the “set of data links” from one system to another (Br. 23). The Examiner found that the argument is out of scope since such manner of dynamically linking is not specifically argued to distinguish differences between the prior art and “the manner appellants have claimed.” (Answer 15). We do not find the Appellants’ argument persuasive as to why Perkowski does not teach the disputed claim limitation (Finding of Fact 3).

The Appellants also argue that paragraph [0085] of Perkowski is silent as to updating dynamic links (Br. 24). The Examiner correctly found that “updating dynamic links” is not a limitation of the rejected claims (Answer 16).

Finally, the Appellants argue that paragraph [0988] of Perkowski describes a clearly manually-performed process by an “author” in which the

author initiates a “datalinking mode,” and creates links by “drawing graphical boundaries around the content . . . using a mouse-pointing device” or “drawing a graphical link between” Web and print-media documents, etc. According to the Appellants, these user actions of “drawing” with a mouse result in creation of links, but the operation remains manually triggered and manually specified (Br. 24). The Examiner found that “automatic” is nowhere recited in the rejected claims and thus the argument is not commensurate in scope with the rejected claims (Answer 16). We agree.

CONCLUSIONS

We conclude that the Specification conveys with reasonable clarity to those skilled in the art that, as of the filing date sought, Appellants were in possession of (1) “dynamically linking said information sets and data items to said numbers and said manufacturer identifiers;” and (2) “dynamic links between the descriptive data items, said part numbers and said manufacturer identifiers.”

We conclude that those skilled in the art would understand the following claim terms when the claim is read in light of the Specification: (1) how “executing a synchronization script or program” “dynamically links the information sets and data items to the part numbers and the manufacturer identifiers;” (2) what are the “contents of a Sales Preparation System;” (3) “a user interface to an Interactive Offer System user interface;” and (4) how

does further adapting the repository synchronizer to replace and add links on a timed basis further limit the system.

We conclude that the Appellants have not shown that the Examiner erred in finding that claims 5 and 10 are indefinite as to how does saving a copy of an information set statically link the copy to the most recently created data items.

We conclude that the Appellants have failed to show that the Examiner erred in finding that Perkowski teaches “by executing a synchronization script or program triggered at predetermined time or responsive to a predetermined event.” We conclude that the remaining arguments advanced by the Appellants are not commensurate with the scope of the claims or otherwise not persuasive.

DECISION

The decision of the Examiner to reject claims 1-15 under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement is reversed. The decision of the Examiner to reject Claims 1-4, 6-9, and 11-13 under 35 U.S.C. § 112, second paragraph, as indefinite is reversed. The decision of the Examiner to reject Claims 5 and 10 under 35 U.S.C. § 112, second paragraph, as indefinite is affirmed. The decision of the Examiner to reject claims 1-15 under 35 U.S.C. § 102(b) as anticipated by Perkowski is affirmed.

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No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv) (2007).

AFFIRMED

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